SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000386-001 DT 12/03/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE TRACTOR & EQUIPMENT CO INC JOHN M PEARCE

v.

STEPHEN A OWENS (001) BARBARA U RODRIGUEZ
ARIZONA STATE DEPARTMENT OF
ENVIRONMENTAL QUALITY (001)

OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

1. Jurisdiction and the Standard of Review.

Pursuant to A.R.S §12-910(e) this court has the authority to review administrative decisions in special actions and proceedings in which the State is a party:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency decision under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.[1] The reviewing court may not substitute its own discretion for that

[1] *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977); *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980).

exercised by the agency,[2] nor may it act as the trier of fact,[3] but must only determine if there is any competent evidence to sustain the decision.[4] This court may not function as "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.[5]

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the administrative hearing, exhibits made of record and the memoranda submitted. Here, Plaintiff, State Tractor & Equipment Co., Inc., seeks review of the Arizona Department of Environmental Quality's (Defendant – hereinafter "ADEQ") administrative order.

2. Facts and the Procedural History of the Case.

Both counsel have done an excellent job in describing the facts and procedural history of this complex and highly technical case. This court has relied heavily upon counsels', and the administrative law judge's explanations of the technical terms and their significance.

Plaintiff owns and operates an underground storage tank (hereinafter "UST") site in Phoenix. On October 3, 1989, four of Plaintiff's USTs were removed from the site and subsequent soil tests were taken. The tests revealed that the tanks had leaked and contaminated the soil with hydrocarbons. Plaintiff hired an environmental consulting firm and installed several groundwater monitoring wells. Defendant, through its Remedial Actions Unit Hydrologist, Eric Zielske, sent Plaintiff a letter stating that Defendant required all groundwater contamination sites have a corrective action plan (hereinafter "CAP") approved before Defendant would allow the UST State Assurance Fund[6] (hereinafter "SAF") remediation work plan to proceed. Defendant's letter further informed Plaintiff that the CAP would need to include monitored natural attenuation (hereinafter "MNA") as a remedial option.[7] Plaintiff submitted a pilot testing plan to Defendant, identifying MNA as a remedial option. On May 27, 1998, Defendant, again through its Remedial Actions Unit Hydrologist, Eric Zielske, informed Plaintiff that MNA would "**not** be an acceptable alternative at this time, since [*sic*] the appearance of contaminants…suggests the groundwater plume is migrating." [Emphasis added] Plaintiff then submitted a revised work plan that did not address MNA, pursuant to Defendant's May 27, 1998 letter and its expert's opinion.

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[2] *Ariz. Dept.of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).
[3] *Siler v. Arizona Dept. of Real Estate*,193 Ariz. 374, 972 P.2d 1010 (App. 1998).
[4] *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz. App. 432, 484 P.2d 201 (1971).
[5] *DeGroot v. Arizona Racing Com'n*,141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).
[6] This fund is administered by the ADEQ.
[7] MNA is a remediation process that depends on natural processes and the passage of time to effect the degradation of contaminants in the soil.

On December 1, 1998, Defendant issued a CAP Guidance document that required the inclusion of MNA as a remedial alternative in all CAPs submitted to Defendant. On April 23, 2001, Plaintiff submitted its CAP to Defendant. The CAP included alternative remediation (soil sparging and soil vapor extraction), listing MNA as only appropriate after cessation of active remediation. Defendant responded with a request for modifications to Plaintiff CAP, including: 1) additional groundwater sampling, or that Plaintiff conduct another round of groundwater monitoring; 2) Plaintiff's CAP would need to include MNA as an alternative remedial method; and 3) suggestions that Plaintiff's CAP lacked a detailed cost analysis for its proposed remedial methods, and a request that such estimates be submitted. Plaintiff filed an informal appeal to Defendant, but Defendant, in its February 13, 2002 Final Decision, simply affirmed its requests for the modifications to Plaintiff's CAP. Though Defendant conceded that Plaintiff's estimates for remedial measure were adequate, Defendant requested that Plaintiff revise its CAP to include a cost estimate for MNA.

Plaintiff appealed Defendant's decision and the matter was set for hearing before the UST Technical Appeals Panel (hereinafter "TAP").[8] The TAP consisted of three UST experts appointed by the Governor of Arizona. The parties were unable to agree on the technical issues to be submitted to the TAP, so an Administrative Law Judge, the Hon. Daniel G. Martin (hereinafter "ALJ"), set the technical issues to be considered at the hearing. Two days of hearings were held,[9] and on February 6, 2003, the TAP issued findings of fact for the ALJ to consider when rendering his recommendation to Defendant. The TAP found for Plaintiff on all of the issues. In a decision dated February 24, 2003 (and transmitted to all parties on February 26, 2003) the ALJ adopted the TAP's findings verbatim and ruled for Plaintiff on all of the issues, and recommended that Defendant reverse its February 13, 2002 Final Decision. Defendant's Director, Stephen A. Owens, rejected the ALJ's recommendation in a brief Final Decison and Order, dated March 28, 2003. In that brief Final Decision and Order, the Director failed to explain his reasons for rejecting the ALJ's (and TAP's) findings and conclusions, but only stated, "Based on a review of the Recommended Decision of the (ALJ) and the record of this matter, the Director rejects the Recommended Decision of the (ALJ)...." Presumably, the parties or their counsel informed the Director that he was without legal authority to reject technical findings of fact made by a TAP and ALJ, unless he determined pursuant to A.R.S. Section 49-1093(I) that the findings were "technically invalid." The Director later amended his Final Decision to include meager explanations for his rejection of the ALJ's and TAP's findings and conclusions in an amended order dated April 23, 2003. Plaintiff has timely filed this administrative review action in the Superior Court.

[8] The Office of Administrative Hearings requested the participation of the TAP due to the extensive technical nature of the subject matter.
[9] November 12, 2002 and January 15, 2003.

3. Issues and Summary of the Decision.

I believe that the threshold issues of the validity and sufficiency of the Director's orders of 3/28/03 and 4/23/03 are dispositive in this case. I find that both orders were arbitrary, capricious, contrary to the law, and an abuse of discretion for the reasons discussed below, and must be reversed with an express approval by this court of the ALJ's and TAP's findings and conclusions.

4. Discussion.

The first issue is the validity and sufficiency of the Director's first decision of March 28, 2003. This decision must be examined in the light of the statutory requirements set forth in A.R.S. Section 49-1093(I), which provides:

> The director may affirm, reject or modify the recommended decision of the administrative law judge. The director *may* only reject or modify the technical findings of fact in the recommended decision if the director determines they are *technically invalid*. The director may only reject or modify the conclusions of law in the recommended decision if the director determines they are incorrect as a matter of law. The director's decision shall be issued in accordance with the time frames prescribed in § 41-1092.08, subsection B. The recommended decision becomes the final administrative decision if the director's decision is not issued within thirty days after receipt of the recommended decision.
>
> [emphasis added]

Nowhere in the ADEQ Director's first Final Decision and Order did he conclude that the ALJ's and TAP's findings and conclusions are "technically invalid", address the validity of the ALJ's technical findings of fact, nor did he address whether the ALJ's conclusions of law were incorrect as a matter of law. His entire disposition consisted of one sentence that read:

> Based on a review of the Recommended Decision of the Administrative Law Judge and the record of this matter, the Director rejects the Recommended Decision of the Administrative Law Judge.

This order of March 28, 2003 is inadequate as a matter of law, and contrary to law, as the Director is without authority to reject an ALJ's or TAP's findings without determining that they are technically invalid. Strangely, Defendants have failed to address this issue in any fashion

other than to argue that Plaintiff bears the burden of demonstrating that the decision is contrary to law or an abuse of discretion.

The ADEQ Director's unqualified disregard for the ALJ's and TAP's findings and conclusions is clear from the record. This disrespect for the hard work and the clear and concise findings and conclusions of the TAP and ALJ is arbitrary and capricious, and constitutes an abuse of discretion by the Director. One seriously wonders why bother to appoint a TAP consisting of well qualified and respected experts within the field when their findings are completely ignored by the Director of ADEQ. And, why go through the motions of administrative hearings before an ALJ, using the precious resources of the Office of Administrative Hearings when those findings and conclusions will be completely ignored, as well? The ALJ's findings of fact and conclusions of law must be given regard by ADEQ, as ALJs are charged with making such determinations. To completely discount and ignore an ALJ's findings would undermine the essence of administrative law; ALJs must be accorded some deference as a finder of fact. A 2003 decision by the Arizona Supreme Court supports this principle: "[T]rial courts must defer to the facts found by the administrative law judges."[10] Agencies must also defer to the facts as determined by an administrative law judge unless they are clearly in error, based upon the record before the ALJ and the agency.

In regard to the Director's amended decision of April 23, 2003, I find that decision to be untimely and lacking in substance. The Director's authority to reject an ALJ's or TAP's findings is limited by A.R.S. Section 49-1093(I) to situations where the Director determines the technical findings to be "technically invalid", and that same statute also requires that a Director's decision be filed within thirty (30) days of the filing of an ALJ's recommended decision. The amended decision of April 23, 2003 was not filed within thirty (30) days of the filing of the recommended decision of the ALJ.

The Director's amended decision of April 23,2003 also lacked substance in its explanation of the reason why the ALJ's and TAP's findings were "technically invalid." The Director simply reiterated the conclusory statements and arguments asserted unsuccessfully by his agency before the TAP and the ALJ. For those reasons discussed above, this court concludes that the Director acted contrary to the law, arbitrarily and capriciously, and abused his discretion in ignoring the recommendations, findings and conclusions of the TAP and ALJ.

[10] *Scottsdale Healthcare, Inc. v. Arizona Health Care Cost Containment System Admin.*, --- Ariz. ----, 75 P.3d 91, 98 (Ariz. 2003); also see *Nutek Information Systems, Inc. v. Arizona Corp. Com'n*, 194 Ariz. 104, 107, 977 P.2d 826, 829, Blue Sky L. Rep. P 74,173, 281 Ariz. Adv. Rep. 34 (App. 1998)("Our determination of the law, however, must be based on the facts determined by the factfinder--in this case the Commission.").

5. Conclusion

I must conclude that the Director of ADEQ acted contrary to law, arbitrarily and capriciously, and abused his discretion in ignoring the findings and conclusions made by the TAP and ALJ.

IT IS ORDERED reversing the decision of the Arizona Department of Environmental Quality.

IT IS FURTHER ORDERED granting the relief as requested by the Plaintiff in its complaint.

IT IS FURTHER ORDERED approving the ALJ's recommended decision and order of February 24, 2003, as the final decision in this case.

IT IS FURTHER ORDERED granting Plaintiff's request for attorney's fees and costs pursuant to A.R.S. Section 12-348(A)(2).

IT IS FURTHER ORDERED that counsel for the Plaintiff shall prepare and lodge a judgment consistent with this minute entry opinion, and its affidavit in support of its application for attorneys' fees and costs no later than December 17, 2003.